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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE MURPHY,

Defendant and Appellant.

C082896

(Super. Ct. No. 15F07335)

A jury found defendant Tyrone Murphy guilty of numerous felonies, including assault with a firearm and infliction of corporal injury resulting in a traumatic condition on his wife, J.M., and found true the allegation that defendant personally used a firearm. The trial court subsequently sentenced defendant to an aggregate term of 15 years eight months in state prison.

On appeal, defendant contends the trial court erred in admitting at trial the preliminary hearing testimony of his victim, J.M., as well as her earlier statements to law enforcement. In support of his contention, defendant argues the People failed to establish their due diligence in attempting to secure J.M.'s presence at trial. He also argues

admission of J.M.'s preliminary hearing testimony and earlier statements to law enforcement violated his Sixth Amendment right to confrontation and his constitutional rights to due process and a fair trial.

We conclude the trial court properly admitted the evidence and affirm the judgment.

I. BACKGROUND

A. *The Attack*

On the morning of November 20, 2015, defendant's wife J.M. called 911. She reported that defendant had "beat [her] up" 30 minutes earlier. She also said defendant hit her in the face. J.M. reported that she believed defendant had a history of domestic violence, but this was the first time she was reporting it. J.M. went outside to her car to hide, "so he d[id]n't hit [her] again." She asked for immediate assistance; defendant was throwing rocks at her car window. She pleaded for the police to "please come" and asked why it was taking "so long." The call was disconnected and J.M. immediately called back. The 911 operator assured her that officers were on their way.

Sacramento Sheriff's Deputy Joe Durran arrived at J.M.'s apartment complex at approximately 8:45 a.m. J.M. told him that she and defendant had been together for six years and had four children together. She and defendant argued in the bedroom of their apartment that morning, each upset with the other's infidelity. The argument became physical when defendant suddenly hit J.M. several times with a closed fist in the head, face, and chest. J.M. grabbed her keys and took refuge in her car. Defendant left the apartment complex on foot with J.M.'s purse, which he threw in a neighbor's yard across the street. He then left in one of their vehicles. J.M. used a female bystander's phone to call 911.

J.M. told law enforcement that the left side of her head hurt, as did her chest area. Detective Duran and Sacramento Police Officer Steven Lee noted that both sides of J.M.'s face were red, as well as her chest. She had scratches on her neck and chest, a

lump on the left side of her head, swelling to her right cheekbone, and the left side of her forehead was swollen. Paramedics treated J.M.'s injuries but she refused to go to the hospital.

Ten to 15 minutes after law enforcement left, J.M. called 911 a second time. She said, "[M]y husband just shot at my car." She repeated, "He just shot at my car!" The shooting left a bullet hole in her car. Defendant took off after the shooting.

Law enforcement returned to J.M.'s apartment complex around 10:25 a.m. J.M. gave the same account of the shooting to Officer Lee that she gave to the 911 operator. J.M. also told Sacramento Sheriff's Deputy Steven Rose she thought defendant was trying to kill her. J.M. was scared and obtained an emergency protective order against defendant.

B. Charges & Preliminary Hearing

Three weeks later, defendant was arrested and charged with numerous felonies, including assault with a firearm (Pen. Code, § 245, subd. (a)(2)—count one) and infliction of corporal injury resulting in a traumatic condition (Pen. Code, § 273.5—count four). As to count one, it was alleged that defendant personally used a firearm (Pen. Code, § 12022.5, subd. (a)).

At the preliminary hearing, J.M. testified that she and defendant have "four beautiful children" together. She admitted she was injured the morning of November 20, 2015, but said it was from a "fistfight" with another woman. She recanted her prior statements that defendant had been violent with her. She said she falsely accused defendant "because [she] was mad at him." She saw defendant that morning, but said he left after the police responded to her first 911 call. J.M. also testified that she did not know who shot at her that morning.

On June 30, 2016, the first day of trial, the prosecutor advised the court that J.M. was "actively evading" service. He indicated that investigators were still trying to serve her with a subpoena to appear.

C. Motion to Have J.M. Declared Unavailable

During trial, the prosecutor made an offer of proof to the court that J.M. was unavailable. The prosecutor noted that J.M. was subpoenaed and appeared at the preliminary hearing. The court, however, did not order her back for the trial. It was the prosecutor's understanding that she had not appeared since. Two weeks earlier, he had "process servers, detectives from the Sheriff's Department and [his] own District Attorney criminal investigators" assigned to assist him in locating J.M.

"The process server went to all known locations for her, talked to family members, sat outside of her apartment, did everything he could in an attempt to locate her and could not, down to he left a message with a maintenance man to keep an eye out for her. He did receive one call that she had been sighted but by the time he received that call, he could not find her."

The prosecutor also advised the court that "Detective Stewart" worked to find J.M. Stewart found J.M.'s car and "sat on her car for a while and never saw her." Stewart spoke with J.M.'s family members. Both Stewart and the process server "repeatedly" spoke with J.M.'s mother, who could not help them locate J.M. They both waited for J.M. at the site where she was to have supervised visitation with her children, but she did not show. And they both "sat outside [J.M.'s] known locations for extended periods of time, all of which they [were] never been able to find her."

J.M. knew the People were looking for her because she called the victim advocate who assisted her previously in the case. The advocate described J.M.'s tone as "hostile, but she did indicate at one point that she would come to court on Monday[, the third day of trial]." J.M. did not show.

The prosecutor himself had not had any contact with J.M. Defense counsel's investigator had contact with J.M. two months prior; she was still "staying at the apartment that [was] listed in all of the reports as her residence." Thus, defense counsel said he "had no difficulty in finding her."

The prosecutor also noted for the court that J.M. “[was] aligned with the defendant, assisting the defendant.” She repeatedly visited and received phone calls from defendant in jail. She also would stand outside the jail where defendant could see her from the window in his cell.

Defense counsel argued the preliminary hearing testimony was inadmissible because prior defense counsel had not cross-examined J.M. at the preliminary hearing.

In finding due diligence, the court noted the People “certainly could have taken the opportunity to have the trial [j]udge order her, recognize her and order her for this hearing for future dates.” The court did not, however, find the failure to do so “fatal to a claim of unavailability . . . , particularly given the posture of th[e] case.” The court noted the prosecutor had been “actively, through multiple sources, seeking to attain [J.M.’s] presence at th[e] hearing by way of law enforcement, [the People’s] own investigators, trying multiple sources.” The court also found J.M. was “undoubtedly fully aware of the proceedings” because she had made contact with the victim advocate.

The question, the court noted was whether that recent activity was sufficient. The court found: “It seems to me that, based on all the evidence, the People’s recent efforts, the witness’s hostility towards prosecution and her apparent desire to avoid process and not be present, that I am prepared to find that she is unavailable for the purpose of the hearsay exception.” The court then found her unavailable.

The court further ruled that prior defense counsel had the opportunity to cross-examine J.M. at the preliminary hearing but made a tactical decision not to. The court reasoned that J.M.’s testimony at the preliminary hearing was helpful to defendant because she recanted her accusations of abuse.

D. Verdict & Sentencing

The jury found defendant guilty of inflicting corporal injury resulting in a traumatic condition and assault with a firearm. They further found true the allegation that defendant personally used a firearm. The trial court subsequently sentenced defendant to

an aggregate term of 15 years eight months in state prison, including one year for inflicting corporal injury, four years for assault with a firearm, and 10 years for personally using a firearm. Defendant appeals.

II. DISCUSSION

J.M. testified at the preliminary hearing and recanted her report of abuse, but the People could not find and serve her for trial. On July 12, 2016, during trial, the People moved to deem J.M. an unavailable witness and admit at trial her preliminary hearing testimony. The trial court heard the People's offer of proof and argument from both sides. Based on the People's offer of proof, the trial court found due diligence, ruled J.M. was unavailable as a witness, and ruled admissible her preliminary hearing testimony.

Defendant contends the admission of J.M.'s preliminary hearing testimony at trial, along with her earlier statements to law enforcement, violated his constitutional rights to confrontation, due process, and a fair trial. He contends there was insufficient evidence to prove the People exercised due diligence to obtain her presence at trial, and it was error to admit her prior testimony because he did not have a similar interest or motive in cross-examining J.M. at the preliminary hearing. Defendant's contentions lack merit.

A. Due Diligence

1. The Law

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) The right of confrontation 'seeks "to ensure that the defendant is able to conduct a 'personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' " [Citations.] To deny or significantly diminish this right deprives a

defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling "into question the ultimate 'integrity of the fact-finding process.'" " " " " (*People v. Herrera* (2010) 49 Cal.4th 613, 620-621 (*Herrera*).)

"Notwithstanding the importance of the confrontation right, it is not absolute. [Citation.] Traditionally, there has been 'an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination' [Citation.] Before the prosecution can introduce testimony from a prior judicial proceeding, however, it 'must . . . demonstrate the unavailability of' the witness. [Citation.] Generally, a witness is not unavailable for purposes of the right of confrontation 'unless the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial.' " (*People v. Cromer* (2001) 24 Cal.4th 889, 897.)

In California, this traditional exception to the right of confrontation for prior recorded testimony is codified in Evidence Code section 1291, subdivision (a), which provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." A witness is unavailable if "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) "Reasonable diligence, often called 'due diligence' in case law, 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'" " " (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.)

In determining whether the People exercised reasonable diligence in procuring J.M.'s presence at trial, the factors we consider include " 'the timeliness of the search, the

importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' ” (*Herrera, supra*, 49 Cal.4th at p. 622.) Courts have found reasonable diligence “when the prosecution’s efforts are timely, reasonably extensive and carried out over a reasonable period,” but not where “the efforts of the prosecutor or defense counsel have been perfunctory or obviously negligent.” (*People v. Bunyard* (2009) 45 Cal.4th 836, 856, 855.) Reasonable diligence does not require exhaustion of every possible means of investigation, only “reasonable efforts to locate the witness.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) “That additional efforts might have been made or other lines of inquiry pursued does not affect” the finding of reasonable diligence. (*Ibid.*)

“We review the trial court’s resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation].” (*Herrera, supra*, 49 Cal.4th at p. 623.)

2. Analysis

Defendant contends the People failed to show due diligence in procuring J.M.’s presence at trial. He argues there was no due diligence hearing and no evidence “from any law enforcement or other witness as to actual steps that had been taken to secure [J.M.]’s attendance.” He also argues the evidence of the People’s efforts was too vague, there was affirmative evidence that J.M. could have been reached with due diligence, and the search was not begun timely. We agree with the trial court’s finding of due diligence.

First, defendant misrepresents the record. Contrary to his assertion, there was a hearing on due diligence. The trial court heard the People’s offer of proof regarding their due diligence and heard defense counsel’s response to that offer of proof. The court considered the proffer and the arguments of counsel and made its ruling. Defendant offers no authority to support his contention that this was not a hearing. The argument, should defendant have intended this to be an argument, therefore is forfeited. (*People v.*

Hardy (1992) 2 Cal.4th 86, 150 [a reviewing court need not address any issue purportedly raised without argument or citation to relevant authority]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [merely setting forth general legal principles without specifically demonstrating how they establish error is insufficient to raise a cognizable issue on appeal]; *Estate of Hoffman* (1963) 213 Cal.App.2d 635, 639 [“It is the duty of counsel to support his claim by argument and citation of authority. [A reviewing court is] not obliged to perform the duty resting on counsel”].)

Second, defendant suggests, without actually making the argument, that counsel’s offer of proof regarding the People’s due diligence was insufficient to establish due diligence because “unsworn statements of counsel are not evidence” and there was no testimony from law enforcement or other witnesses about the efforts made to secure J.M.’s presence at trial. Defendant ignores the fact that trial counsel did not challenge the People’s offer of proof, nor did counsel ask for an evidentiary hearing.

Defendant is thus arguing, or suggesting, that trial courts cannot rule on the question of due diligence based on an offer of proof when no challenge is made to the proffer and no request is made for an evidentiary hearing. Defendant, again, cites no authority to support this assertion. If defendant intended this to be an argument in support of his claim on appeal, we reject it. (*People v. Hardy, supra*, 2 Cal.4th at p. 150; *Guthrey v. State of California, supra*, 63 Cal.App.4th at pp. 1115-1116; *Estate of Hoffman, supra*, 213 Cal.App.2d at p. 639.)

Third, defendant criticizes the People’s evidence as “very broad, conclusory, and somewhat unclear.” We disagree. The prosecutor’s offer of proof provided ample evidence of the People’s due diligence.

The prosecutor advised the court that there were multiple individuals looking for J.M. They went to all her “known locations,” including her car, and waited for “extended periods of time” to see if she would arrive; she never did. They spoke with several of J.M.’s family members, and repeatedly to J.M.’s mother, with no success. They asked a

maintenance man at J.M.'s apartment to keep an eye out for her; when he called, they went looking for her, again to no avail. They went to the location where she was supposed to participate in supervised visitation with her children, but she failed to show for that as well.

Furthermore, the trial court found J.M. was actively trying to avoid process and the record supports that finding. J.M. contacted her victim's advocate, but was "hostile." She said she would appear in court but did not. She had recanted her report of abuse and otherwise appeared aligned with defendant; repeatedly visiting him and receiving his calls from jail, and standing outside the jail so he could see her from the window in his cell. Her willingness, therefore, to talk to defendant's investigator is not, as defendant suggests, evidence that the People could have made contact with more effort.

Defendant also criticizes the People's failure to start the process earlier. We agree with the trial court's assessment that the People could have taken the opportunity to secure J.M.'s presence at the preliminary hearing. But the People did not wait until "the morning [] trial begins . . . after being out of touch for several months." (*People v. Avila* (2005) 131 Cal.App.4th 163, 169.) They last had contact with J.M. at the preliminary hearing four months earlier. J.M. also appeared at the preliminary hearing even though her testimony at that hearing indicated she was already re-aligned with defendant. The People had contact information for several of J.M.'s family members and she was still living in the same apartment. The People had no reason to believe J.M. would evade service.

Accordingly, waiting until two weeks before trial to begin the process of serving J.M. did not demonstrate a lack of diligence. (*People v. Linder* (1971) 5 Cal.3d 342, 345-347 [the defendant's attempt to serve subpoena on missing ex-wife at last known address one day before trial constituted due diligence where defendant's attorney had previously contacted former wife's relatives and lawyer and hired detective trying to find her]; *People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1236, disapproved on another point by

The admission of former testimony under such circumstances complies with constitutional requirements “ ‘not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of confrontation at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant’s right to effective cross-examination against the public’s interest in effective prosecution.’ ” (*People v. Samayoa* (1997) 15 Cal.4th 795, 850.)

Preliminarily, the right to confront witnesses requires only that defendant be given the *opportunity* to cross-examine witnesses. (Evid. Code, § 1291, subd. (a)(2); *Harris, supra*, 37 Cal.4th at p. 333.) Defendant makes no argument that he was not given that opportunity. Indeed, defendant was present at the preliminary hearing and was represented by counsel. Trial counsel made a decision not to cross-examine J.M. and to allow her recantation to stand on its own.

Additionally, defendant’s claim notwithstanding, his motive and interest in questioning J.M. at the preliminary hearing were fundamentally the same as at trial; to undermine her claim that defendant beat her. Defendant’s claim that he had no reason to cross-examine J.M. at the preliminary hearing because she had withdrawn her accusation ignores the evidentiary impact of J.M.’s recantation. Once J.M. renounced her claims of abuse, defense counsel knew at the preliminary hearing that the prosecution would rely on her inculpatory statements to law enforcement. Accordingly, the defense had the same motive in the preliminary hearing as at trial, to undermine the validity of those early statements to law enforcement.

In a related argument, defendant also contends the admission of J.M.’s statements to law enforcement violated his Sixth Amendment right to confrontation. But those statements were admitted only for purposes of impeachment, not their truth. “[T]he confrontation clause does not prohibit the prosecution from impeaching the former testimony of its own unavailable witnesses with their inconsistent statements, provided those statements are admitted only for impeachment purposes.” (*People v. Blacksher*

(2011) 52 Cal.4th 769, 808; see Evid. Code, § 1202.) Accordingly, J.M.’s out-of-court statements to law enforcement were properly admitted.

C. Due Process and a Fair Trial

Defendant further contends that admission of J.M.’s preliminary hearing testimony violated his constitutional right to due process and a fair trial. Defendant’s argument lacks merit.

Defendant did not present a constitutional claim in the trial court. Therefore, his constitutional claim on appeal is limited. Defendant may argue for the first time on appeal that the asserted evidentiary error had the legal consequence of violating due process, but our rejection on the merits of defendant’s claims of evidentiary error under the statute necessarily leads us to reject his new claims of constitutional error. (See *People v. Partida* (2005) 37 Cal.4th 428, 436-439.)

Moreover, our Supreme Court has “long observed that ‘[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a . . . defendant’s constitutional rights.’ [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.) Defendant does not persuade us this case presents an exception to this general rule.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

BLEASE, Acting P. J.

/S/

ROBIE, J.